Supreme Court, U.S.
FILED
APR 19 1996
CLERK

No. 95-1510

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

FRED CASSITY d/b/a
C & B TRUCKING, - - - - - *Petitioner,*

versus

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET - *Respondent.*

On Petition For Writ of Certiorari From
Decision of the Supreme Court of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the requirements of due process were satisfied where a motor carrier was given the opportunity for a hearing both before and after the statutorily mandated impoundment of his vehicle for operating without the required license and with said vehicle being overweight.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1– 3
ARGUMENT	3–10
I. The Supreme Court of Kentucky Correctly Determined That Cassity Had an Opportunity for a Full-Blown Due Process Hearing	5– 6
II. The Supreme Court of Kentucky has Applied the Law of the Supreme Court of the United States and Correctly Determined That the Requirements of Due Process Were Satisfied	7– 9
III. The Transportation Cabinet's Procedures Were Entirely Appropriate, and Did Not Violate 42 U.S.C. §1983	9–10
CONCLUSION	10–11

TABLE OF AUTHORITIES

PAGE

Cases:

Adams v. *Burke*, 308 Ky. 722, 215 S.W.2d 531 (Ky. 1949) 8

Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) 3, 4, 8

Division of Drivers' Licensing v. *Bergmann*, 740 S.W.2d 531 (Ky. 1987) 6

Dixon v. *Love*, 431 U.S. 105 (1977) 8

Ellis v. *Dixon*, 349 U.S. 458, reh'g denied, 350 U.S. 855, (75 S.Ct. 850) (N.Y., 1955) 9

Maney v. *Mary Chiles Hospital*, 785 S.W.2d 480 (Ky. 1990) 9

Matthews v. *Eldridge*, 424 U.S. 319 (1976) 4, 7

U.S. v. *James Daniel Good Real Property, et al.*, 510 U.S. ___ (1993) 3, 4, 7, 8

Statutes:

KRS 138.665 ..... 1, 5

KRS 281.615 1

KRS 186.150 1

KRS 198.222 2

KRS 138.729 ..... 2, 4, 6

42 U.S.C. §1983 ..... 2, 3, 9

KRS 138.725 ..... 5, 6

KRS 138.720 5

KRS 138.990(15) 5, 9, 10

KRS 138.655 ..... 5, 6

KRS 138.990(14) 5, 8

KRS 24A.110(2) 8, 9

KRS 138.990 8

KRS 281.990(2) 8

KRS 186.990(9) 8

KRS 189.270(2)(b) 8

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STATEMENT OF THE CASE

The Commonwealth of Kentucky, Transportation Cabinet ("Transportation Cabinet"), through Enforcement Officer Martin Slone, acted according to state law and Transportation Cabinet regulations, at all times pertinent to this action.

On April 8, 1988, Enforcement Officer Martin Slone, acting for the Kentucky Transportation Cabinet, cited Mr. Cassity for violation of (1) KRS 138.665, no motor fuel user's license; (2) KRS 281.615, no authority; (3) KRS 186.150, resident not to use out-of-state license; and (4)

KRS 198.222, overweight. Enforcement Officer Slone's citations directed Mr. Cassity to appear in Pike District Court on April 26, 1988.[1]

Although the Petitioner argues that the Transportation Cabinet should have enacted a procedure for a hearing, the Transportation Cabinet was actually prohibited from enacting such a procedure, as it would conflict with the Commonwealth's statutes. However, the Petitioner's argument that Fred Cassity never had a hearing is totally misleading.

Cassity had the benefit of a hearing ***before*** the impoundment, under KRS 138.729, with respect to the revocation of his license, which occurred years before the impoundment. Enforcement Officer Slone further scheduled the matter to be heard on the citations before the Pike District Court, ***after*** impoundment, although the District Court Judge, through no fault of the Transportation Cabinet, incorrectly determined that he had no jurisdiction over the citations. Since the Transportation Cabinet adhered to state law, and since the Transportation Cabinet could not have changed the procedures in a manner which would have conflicted with state law, the Transportation Cabinet cannot be found to have violated 42 U.S.C. §1983.

At the District Court hearing on the Transportation Cabinet's citations, the District Court Judge ruled, without citing authority, that it did not have jurisdiction, and Mr. Cassity did not appeal. Thus, no hearing adjudicated the criminal penalties attached to the citations.

The Supreme Court of Kentucky, in a unanimous decision, ruled that such an impoundment did not deprive Cassity of due process of law, in light of the fact that

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[1] Slone additionally provided Cassity with written instructions at the time of the citation, which, had Cassity followed same, would have provided for release of the impounded vehicle in a matter of hours.

Cassity was afforded an opportunity to be heard, both before and after the impoundment, and the United States Supreme Court's due process balancing test does not require an additional hearing.

ARGUMENT

By requesting that his Petition be granted, Petitioner desires to revisit a matter this Court has previously settled and has addressed at length. Supreme Court Rule 10 provides that Petitions for Writ of Certiorari will be granted "only for compelling reasons." While one such stated reason is where a state court has decided a question of federal law in a way that conflicts with relevant decisions of this Court, it is well established that a mere assertion of conflict with a Supreme Court precedent will not suffice. S.Ct.R. 10(a)(c). The conflict must, in actuality, exist.

Accordingly, Petitioner's assertion that the Kentucky Supreme Court has authorized, by decision, the Transportation Cabinet's practice of seizing and impounding commercial vehicles in violation of 42 U.S.C.§1983, entirely misses the mark. There must indeed ***be*** a conflict between the state court holding and decisions of this Court. A reading of Petitioner's argument in his Petition for Writ of Certiorari reveals that there is in fact no conflict between the decision of the Kentucky Supreme Court and ***any*** holding of this Court.

The Petitioner cites two cases in his Petition which he claims support his position in the instant case. These cases are *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), and *U.S.* v. *James Daniel Good Real Property, et al.*, 510 U.S.___ (1993). The issue in regard to both of these cases deals with notice and a hearing where *ex parte* seizure of forfeitable property occurred. Neither of these cases, however, bears on the issue at hand, nor in any way conflicts with the decision of the Kentucky Supreme Court. The Kentucky Supreme Court did not dis-

agree, much less hold, that a due process hearing is not required under the circumstances. What it did in fact hold, is that by virtue of KRS 138.729, any motor carrier, including Cassity, has the opportunity for a hearing concerning the revocation of his license, and therefore due process requirements are satisfied.

There is additionally a clear, factual distinction between the instant case and those cited by the Petitioner in his Petition, in that here the Petitioner ***was*** entitled to a hearing, whereas in *Calero-Toledo* and *James B. Good*, both *supra*, no prior hearing opportunity was given. Thus, from this distinction alone, by no stretch of the imagination can it be concluded, as the Petitioner asserts, that there exists any conflict between the Kentucky Supreme Court's decision and any relevant decision of the United States Supreme Court.

The Kentucky Supreme Court further utilized the three-pronged analysis founded in *Matthews* v. *Eldridge*, 424 U.S. 319 (1976), to test whether due process concerns for those individuals whose protected interests are subject to state action are satisfied. This correct application of the law with respect to the facts of the instant case was determined by the Commonwealth's highest court that all due process requirements had been satisfied. They were satisfied because the Petitioner ***was*** afforded an opportunity for a hearing, and an additional hearing was not required on issues which would previously have been reviewed had the Petitioner pursued his administrative remedies.

The Respondent prays that writ of certiorari be denied as no compelling reasons exist for such action, since the Petitioner has shown no conflict between the Kentucky Supreme Court's decision and any decision of this Court.

I. THE SUPREME COURT OF KENTUCKY CORRECTLY DETERMINED THAT CASSITY HAD AN OPPORTUNITY FOR A FULL-BLOWN DUE PROCESS HEARING

Initially, it is important to understand the statutory provisions which govern the actions taken with respect to the Transportation Cabinet's impoundment of the Petitioner's vehicle. The Transportation Cabinet acts as the enforcement agency for the Revenue Cabinet with regard to motor carriers that do not pay their usage tax. KRS 138.725. This tax is paid through the issuance of a Kentucky motor fuel user's license (also known as a KYU). KRS 138.665. It is unlawful to operate on Kentucky's highways without this license. KRS 138.720.[2] If cited for operation without this license, impoundment by the Transportation Cabinet is ***mandatory***. KRS 138.990(15).[3]

Pursuant to Transportation Cabinet policy, the enforcement officer must receive authority from a superior officer before impounding a vehicle. The superior officer then contacts the Division of Motor Carriers to ascertain the status of the vehicle in question. Once the violation has been confirmed, the authority to impound is passed to the enforcement officer in the field and the vehicle is impounded.

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[2] KRS 138.720. Prohibited acts. - With respect to KRS 138.655 to 138.725, it is unlawful for any person to:

(1) Fail to pay the tax imposed;

. . .

(4) Conduct any activities requiring a license without such license or after such license has been surrendered, cancelled or revoked; . . .

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[3] KRS 138.990(15) - In addition to the penalties provided in KRS 138.990(14), the motor vehicle or vehicles of any person violating any provision of KRS 138.720 shall be subject to seizure by any officer duly authorized to enforce the provisions of KRS 138.655 to KRS 138.725.

Where the motor carrier does not pay the required tax to obtain a Kentucky motor fuel user's license, the license is cancelled and notice is sent informing the motor carrier of the deficiencies. A motor carrier has a right to a hearing at the time of the cancellation of the license. KRS 138.729.[4] The user may thus challenge the cancellation, if not satisfied by the Transportation Cabinet's ruling, which appeal is a *de novo* hearing. *Id.*

Records indicate that Petitioner's KYU was revoked in 1978. However, Petitioner did not follow, and in fact has never contended that he did follow, the procedures available to him which would have entitled him to a hearing on the revocation of his license. Therefore, he was not entitled, as he suggests, to an additional hearing on the same matter.

As the Kentucky Supreme Court correctly noted, Petitioner had the opportunity to correct any clerical errors with regard to his license or extended weight decal by submitting a written objection. This could have been accomplished at any time after the revocation of the KYU license, and well before the citation and subsequent impoundment. Thus, the Commonwealth's highest court, citing its prior decision in *Division of Drivers' Licensing* v. *Bergmann*, 740 S.W.2d 948 (Ky. 1987), ruled appropriately in holding that there is no additional right to a hearing when a previous opportunity to be heard has been provided.

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[4] KRS 138.729. Appeal. - Any final ruling of the department of vehicle regulation with regard to the administration of KRS 138.655 to 138.725 shall be appealed to the Kentucky board of tax appeals.

II. THE SUPREME COURT OF KENTUCKY HAS APPLIED THE LAW OF THE SUPREME COURT OF THE UNITED STATES AND CORRECTLY DETERMINED THAT THE REQUIREMENTS OF DUE PROCESS WERE SATISFIED

The Supreme Court of Kentucky correctly determined that the law which applies to this case is *Matthews, supra.* The Commonwealth's highest court correctly applied *Matthews, supra,* to determine whether additional or substitute proceedings were required. Moreover, that court correctly concluded that the requirements of due process had been satisfied. The factors to be considered are: (1) the nature and weight of the private interests; (2) the risk of erroneous deprivation of such an interest as a consequence of the summary procedures used; and (3) the governmental function involved and the state interests served, weighed against the administrative and fiscal burden. *Id.,* at 335-336.

The Commonwealth's highest court reasoned, "Although Cassity's interest in his vehicle is significant, it is counterbalanced with the state's compelling interest in collecting tax revenues. The risk of erroneous deprivation is low considering the procedures the Transportation Cabinet follows before impounding the vehicle." The enforcement officer confirms the status of the license, where the license is not present. The Court also weighed the importance of the administrative and financial burdens that would accompany enactment of additional procedures, and determined that the due process requirements had been satisfied.

The Petitioner, by counsel, cites the case of *James Daniel Good Real Property, supra,* for the proposition that he was entitled to an additional, or substitute hearing. However, in the instant case, contrary to the Defendant's interest in *James Daniel Good Real Property, supra,* the driver's interest is low considering the Commonwealth's compelling interest in collecting tax revenues for the cost of maintain-

ing the very roads the Petitioner was using. Although the vehicle is detained, the driver operating the vehicle without a license has no interest in driving on Kentucky's roads. The Commonwealth, as part of its police power, may regulate the use of the highways by any common carrier. *Adams* v. *Burke*, 308 Ky.722, 215 S.W.2d 531 (Ky. 1949). Driving is a privilege, not a right. When a Transportation Cabinet enforcement officer observes someone driving without the required license, the enforcement officer must then cite the driver and impound the vehicle pursuant to the directives of the Legislature. KRS 138.990. Thus, a driver has little, if any, interest in driving on Kentucky's roads when he drives without a license.

The interests served by the impoundment procedure, on the other hand, are compelling. The ease with which a motor carrier could frustrate the state's interest creates a "special need for very prompt action that justifies the postponement of notice and hearing until after the seizure." *James Daniel Good Real Property*, and *Calero-Toledo*, both *supra*. Moreover, the state also has a compelling interest in regulating the highways. *Dixon* v. *Love*, 431 U.S.105 (1977).

While Cassity asserts that no review of the citation was available, this assertion is misleading. The Pike District Court, not the Transportation Cabinet, has jurisdiction to review charges which have been denominated as misdemeanors or violations. KRS 24A.110(2). All of the citations are either denominated as a violation or a misdemeanor[5]. Thus, review was available, at the district court, after impoundment of the vehicle.

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[5] Citation for "no motor fuel user's license is a misdemeanor. KRS 138.990(14).Citation for "no authority" is a violation. KRS 281.990(2). Citation for "resident not to use out-of-state license" is a misdemeanor. KRS 186.990(9). Citation for "over-weight" is a misdemeanor. KRS 189.270(2)(b).

Moreover, district court has ***exclusive*** jurisdiction over criminal misdemeanors and violations. KRS 24A.110(2).[6] Therefore, the Transportation Cabinet ***could not enact*** a procedure to review criminal citations. Such action on the part of the Transportation Cabinet would have been in conflict with the Legislature's decision, enacted by statute.

III. THE TRANSPORTATION CABINET'S PROCEDURES WERE ENTIRELY APPROPRIATE, AND DID NOT VIOLATE 42 U.S.C. §1983

To prevail upon his allegations, the Petitioner must obtain a holding which essentially finds that the impoundment statute, KRS 138.990(15), is unconstitutional. Cassity, however, has never challenged the statute's constitutionality. Such a challenge must be directed to the Attorney General of the Commonwealth, who was never joined as a party. *Maney* v. *Mary Chiles Hospital*, 785 S.W.2d 480 (Ky. 1990). Rather, the Transportation Cabinet's actions alone have been challenged under 42 U.S.C. §1983. Where the question was not raised in the state court proceeding, the question is not open in the proceeding on the Petition for Writ of Certiorari. *Ellis* v. *Dixon*, 349U.S.458, *reh'g denied*, 350 U.S. 855, (75S.Ct.850) (N.Y., 1955). Thus, Cassity's question "Whether a Kentucky law . . . satisfied due process . . . " cannot be addressed.

As stipulated, the Transportation Cabinet complied with the state law and its own policies and procedures. The only challenge has been whether the Transportation Cabinet should have enacted an additional or substitute hearing process. The Transportation Cabinet could not enact

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[6] KRS 24A.110. Criminal jurisdiction. -

(2) The district court has ***exclusive*** jurisdiction to make a final disposition of any charge or a public offense denominated as a misdemeanor or violation, . . . (Emphasis added.)

such a procedure, even if appropriate, as to do so would be in conflict with the State statutes.

CONCLUSION

The Supreme Court of Kentucky correctly applied the appropriate three-pronged analysis espoused by this Court, and determined that due process is satisfied with the current procedures employed by the Transportation Cabinet. The Transportation Cabinet administers the vehicle-related provisions of the Revenue Cabinet. The Legislature provides for review of the Transportation Cabinet's actions elsewhere.

Cassity was indisputably provided with both a pre-seizure and a post-seizure hearing. Opportunity for hearing on the license revocation was provided ***before*** the impoundment question could have arisen, at the Board of Tax Appeals, initially upon revocation of his license. Additionally, prompt opportunity for hearing was provided ***after*** the citation and impoundment, at the Pike District Court, initiated by issuance of the citations on April 8, 1988, and simultaneous assignment for hearing on April 26, 1988. These procedures clearly meet the requirements for procedural due process.

Moreover, the Transportation Cabinet could not allow Cassity to continue to drive without the required license, making it mandatory for the enforcement officer to seize the subject vehicle, pursuant to statute [KRS 138.990(15)]. The Legislature, acting through its police power, enacted appropriate statutes to that effect, and further enacted review procedures. These procedures were followed by the Transportation Cabinet to the letter. Cassity failed to avail himself of his opportunities for review, and should be finally precluded from attempting to shift the blame for his own inaction.

For the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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